United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

76-7008

To be argued by
STEPHEN A. WEINER

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P/S

United States Court of Appeals
For the Second Circuit

MONROE KORN,
Plaintiff-Appellant,

against

FRED H. MERRILL, *et al.*,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

MONROE KORN, Plaintiff-Appellant, - against - FRED H. MERRILL, REID W. DENNIS, S. WALDO COLEMAN, HERBERT E. DOUGALL, WALLACE H. FULTON, WILLIAM WALLACE MEIN, JR., GEORGE E. OSBORNE, PHILIP A. RAY and RICHARD F. THARP, JOHN DOE 1 to JOHN DOE 1,000 (Fictitious names, the true names being unknown to plaintiff, the parties intended being those, other than any defendants above named, who in 1968 exchanged stock of The Fund American Companies for stock of American Express Company), FUND AMERICAN COMPANIES, AMERICAN EXPRESS INVESTMENT MANAGEMENT COMPANY, AMERICAN EXPRESS COMPANY, and AMERICAN EXPRESS INVESTMENT FUND, INC., Defendants-Appellees.	:	Docket No. 76-7008

BRIEF OF DEFENDANTS - APPELLEES

Defendants-appellees American Express Company, American Express Investment Management Company, FA Liquidating Corp. (formerly The Fund American Companies), Reid W. Dennis, Herbert E. Dougall, William Wallace Mein, Jr., Fred H. Merrill and George E. Osborne respectfully submit this brief in opposition to the appeal of plaintiff-appellant Monroe Korn from a decision of Judge Robert L. Carter of the United States District Court for the Southern District of New York dated October 31, 1975, and reported at 403 F.

Supp. 377 and at CCH Fed. Sec. L. Rep. ¶ 95,355. By such decision Judge Carter granted summary judgment in defendants' favor on the ground that assertion of the claims alleged in the complaint was barred by the statute of limitations.

STATEMENT OF ISSUES PRESENTED

1. Should a summary judgment dismissing a derivative suit on limitations grounds be reversed for failure to apply an alleged tolling doctrine, resulting from a claimed adverse domination of the nominal corporate defendant by the accused wrongdoers, when:

(a) this issue, which presented basic factual questions, was in no way raised by plaintiff in the District Court as a reason for denial of summary judgment;

(b) no exceptional circumstances, or considerations of overriding public importance, justify a de novo resolution of the issue at the appellate level;

(c) the events giving rise to the claim have been public knowledge since they occurred, and no "domination" prevented timely commencement of a derivative action; and

(d) the defendant directors of the allegedly injured corporation in no way profited from the transactions sued upon, and a majority of them had no connection with the allegedly profiting defendants?

2. Should a summary judgment, determining that a claim of a corporation accrued in California for purposes of the New York borrowing statute, be reversed for improper resolution of factual questions when:

(a) the corporation concededly had its principal place of business in California, and would have experienced any injury in that state;

(b) the undisputed evidence established that the activities complained of were carried out primarily in California; and

(c) plaintiff never raised in the District Court, by affidavit or otherwise, any genuine issues of material fact relating to determination of place of accrual?

3. Should a summary judgment be reversed for failure to give plaintiff an adequate opportunity for discovery, when defendants have already afforded plaintiff certain discovery on the merits, and plaintiff never sought any further discovery for the purposes of opposing defendants' motion?

4. When Congress has provided no controlling statute of limitations for a claim under the federal securities laws, should application under the forum state's borrowing statute of a shorter period than that of the forum itself be rejected as offensive to federal policy?

STATEMENT OF THE CASE

A. The Complaint Herein

On April 29, 1974 -- more than five years after the transactions complained of and almost three years after this Court's Rosenfeld v. Black decision* -- this derivative action was commenced on behalf of American Express Investment Fund, Inc. ("Fund"), an open-end investment company, by plaintiff Monroe Korn, one of Fund's 25,000 stockholders. (88a) No other stockholder of Fund has ever asserted a similar claim.

In 1968 and for some years prior thereto, defendant Fund American Investment Management Company ("FAIMCO"), later known as American Express Investment Management Company ("AEIMCO"), had served as investment advisor to Fund (then known as Commonwealth Investment Company) under an investment advisory agreement between Fund and FAIMCO. Pursuant to an underwriting agreement between Fund and FAIMCO, in 1968 and for some years prior thereto FAIMCO had also acted as principal underwriter for shares of stock of Fund sold to the public on a continuous basis. FAIMCO was at that time a wholly-owned subsidiary of defendant The Fund American Companies ("FAC"), now know as FA Liquidating Corp. (109a-110a)

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* 445 F.2d 1337 (2d Cir. 1971)

The complaint herein related to the acquisition by a newly formed, wholly-owned subsidiary of defendant American Express Company ("Amexco") in the fall of 1968 of substantially all the assets of FAC, including all the outstanding shares of stock of FAIMCO, in exchange for shares of preferred stock of Amexco, which shares were then distributed to the stockholders of FAC. (7a) The FAIMCO shares were only a small portion of the total assets transferred by FAC, which was engaged through subsidiaries in the property and casualty insurance, and life insurance, businesses. (110a-111a) The complaint attacked the transaction between FAC and Amexco as a sale to Amexco "of FAIMCO's fiduciary position as investment advisor, and its position as principal underwriter of Fund, in violation of the [Investment Company] Act [of 1940]." (9a-10a)

The complaint also referred to the execution of a new underwriting agreement between FAIMCO and Fund, pursuant to approval of the Board of Directors of Fund, and of a new investment advisory agreement between FAIMCO and Fund, pursuant to approval of the stockholders of Fund at a special meeting held on September 24, 1968. (9a) Such approvals were required by the provisions of the Investment Company Act of 1940, since the change in controlling ownership of FAIMCO automatically terminated the existing investment

advisory and underwriting agreements. The complaint alleged that an unspecified portion of the securities of Amexco received for the assets of FAC "constituted payment for the fiduciary offices and for defendants' inducing Fund stockholders to approve the reinstatement of the advisory agreement between Fund and FAIMCO." (10a) It was asserted that defendants breached their fiduciary duties to Fund by causing to be paid to FAC and its stockholders, rather than to Fund, the consideration Amexco "was willing to pay . . . for the privilege of controlling or becoming the advisor and principal underwriter of Fund. . . ." (10a)

The complaint also alleged that Fund's proxy statement of August 1968, issued in connection with the special meeting of stockholders of September 24, 1968, was materially false, misleading and incomplete, because, inter alia, it "failed to reveal that Fund and its stockholders were entitled to the profits arising from defendants' sale of their fiduciary offices." (11a)

Named as defendants in the action were the nine individuals who were directors of Fund at the time of the transactions complained of (only five of whom have ever been served), FAC, AEIMCO (formerly FAIMCO), Amexco and Fund as a nominal defendant. Also named as defendants, pursuant to the use of fictitious names John Doe 1 to John

Doe 1,000, were the former stockholders of FAC who in 1968 exchanged stock of FAC for stock of Amexco. The relief demanded, inter alia, was a judgment requiring the defendants other than Fund, jointly and severally, to pay to Fund "the defendants' profits and Fund's losses. . . ." (15a)

B. The Motion to Transfer

On June 20, 1974 defendants filed a motion, pursuant to 28 U.S.C. § 1404(a), to transfer the action to the United States District Court for the Northern District of California. (2a, 87a) In response to this motion plaintiff served defendants with Interrogatories Relating to Change of Venue (53a-58a), to which defendants provided extensive answers. (59a-86a)

On April 7, 1975 Judge Carter denied the motion to transfer, holding that defendants had not met their burden of showing that the balance of convenience weighed heavily in their favor. (95a-106a) He noted that material witnesses were located in both New York and California; that negotiations took place in both states; and that attorneys, accountants and other personnel who worked on the matters complained of, and submitted reports, were present in both states. (103a)

While denying the motion on the foregoing grounds, Judge Carter expressly characterized as "'mere forum shopping'"

plaintiff's contention that transfer should be disallowed because Rosenfeld v. Black was more favorable for him than the Ninth Circuit's decision in Securities and Exchange Commission v. Insurance Securities Inc., 254 F.2d 642 (9th Cir.), cert. denied, 358 U.S. 823 (1958). (105a) Judge Carter also observed:

> "....there is no certainty that Rosenfeld will be applicable to this case. Judge Friendly, who authored Rosenfeld, has pointed out in Newman v. Stein, 464 F.2d 689, 694-96 (2d Cir. 1972), that there is no certainty that Rosenfeld will remain viable in the light of various legislative efforts to blunt the force of its holding and the distinct possibility that the United States Supreme Court might at some point resolve the conflict between Rosenfeld and Insurance Securities in the latter's favor. Moreover, there is no assurance of certainty that application of Rosenfeld to the facts developed at trial will measure up to plaintiff's expectations." (105a-106a)

C. Discovery Below

In his brief plaintiff categorically asserts that the interrogatories related to the motion to transfer "are the only pretrial discovery had in this matter to date." (App. Br. p. 5; see also p. 21). This statement is false. On June 11, 1974, prior to the filing by defendants of their motion to transfer, plaintiff served defendants with a 23-page document entitled "Plaintiff's Interrogatories-First Series." On November 11, 1974 defendants served and filed 36 pages of answers to such interrogatories, not including 15 pages of exhibits. (3a) Such answers also

identified voluminous documents, and stated that they would be made available for plaintiff's inspection at the offices of the defendant having possession of same at a mutually agreeable date.

At no time did plaintiff ever request an opportunity to inspect the documents. Moreover, at no time did plaintiff ever notice any depositions or otherwise seek any form of discovery to supplement the answers to interrogatories.

D. The Decision Appealed From.

On April 29, 1975 all defendants who had been served with process, other than Fund itself, moved for judgment on the pleadings or for summary judgment on the ground that the claims alleged in the complaint were barred by the statute of limitations. (107a-108a) In support of the motion defendants submitted an affidavit, with exhibits, of defendant Fred H. Merrill, who was Chairman of FAC, FAIMCO and Fund at the time of the events complained of. (109a-129a) No opposing affidavits were submitted by plaintiff other than an affidavit as to plaintiff's New York residence. (93a-94a, 134a) Nor did plaintiff seek an opportunity, pursuant to Fed. R. Civ. P. 56(f), to obtain opposing affidavits or to engage in further discovery proceedings.

In a thorough and carefully reasoned 29-page opinion, Judge Carter granted the motion for summary judgment. (147a-175a)

Judge Carter first stated that New York's "borrowing statute," as set forth in CPLR § 202, was applicable to the

federal claims asserted, in view of the failure of Congress to specify a federal statute of limitation, and the well-accepted doctrine that state law, including the state borrowing statute, was controlling under these circumstances. (156a-157a) He noted that the borrowing statute would govern herein if the cause of action asserted by plaintiff accrued in favor of a non-resident of New York, and if it accrued outside New York. (157a-158a)

Judge Carter held that, in view of the status of the action as a derivative suit, the cause of action alleged in the complaint accrued in favor of Fund, a non-resident of New York, rather than the shareholder plaintiff, who had no greater rights than Fund. Accordingly, he found that the first test for application of CPLR § 202 had been met. (158a-163a)

Turning to the second test, Judge Carter held that, under this Court's decision in Sack v. Low, 478 F.2d 360 (2d Cir. 1973), the cause of action for purposes of CPLR § 202 accrued in California, where Fund had its principal place of business and where its economic loss, if any, from the events complained of would be focused. (163a-167a) Judge Carter also observed that, even if the teaching of Sack v. Low were not followed, and the controlling standard was deemed to be "the place where the alleged wrongful acts were committed, the cause of action asserted by plaintiffs may nonetheless be said to have accrued in California." (164a) He reviewed the undisputed facts in the record and concluded that there was

"overwhelming evidence that the activities complained of were carried out primarily in California." (165a)

As a third ground for holding that the final test of CPLR § 202 was satisfied, the court noted "that even if this action may be thought of as having accrued both in New York and California, the Second Circuit has indicated [in Sack v. Low] that the cause of action is still deemed to have accrued 'without the state' for purposes of CPLR § 202." (165a)

Applying the California statute of limitations, Judge Carter held that this action, predicated on events occurring in 1968, was barred by the 3-year period specified in § 338 of the California Code of Civil Procedure and the 4-year period specified in § 343, whichever might be applicable. (167a-171a) While the statute would begin to run "only from the date of the discovery of the fraud or from the date the fraud should upon reasonable inquiry have been discovered" (169a), the court observed that "[t]he record reveals, and plaintiff has not denied, the existence of numerous facts sufficient in the view of this court as a matter of law to have put plaintiff upon notice and inquiry, and to have caused him to commence the running of the period of limitation." (170a)

Finally, Judge Carter ruled that plaintiff's claim for the return of investment advisory and underwriting fees paid by Fund to FAIMCO (and its successor AEIMCO) since the

1968 sale of FAIMCO did not constitute independent wrongs for statute of limitations purposes, but rather flowed from the 1968 events complained of. Accordingly, any such claim was also barred by the applicable California statutes of limitations. (172a-175a)*

E. The Appeal Herein

On this appeal plaintiff accepts many of the links in the chain of reasoning followed by Judge Carter. Specifically, plaintiff does not challenge the lower court's conclusions that the cause of action accrued in favor of a non-resident of New York, that the running of the California limitations period was not tolled by any inability of plaintiff to discover the alleged fraud, and that a time bar against recovery of damages suffered in 1968 would preclude recovery of payments made by Fund to FAIMCO and AEIMCO since such date.

Rather, plaintiff asks this Court to reverse Judge Carter's decision on the basis of a claim never made or even hinted at below, namely, that any applicable statute of limitations has been indefinitely tolled because of the alleged adverse domination of the nominal corporate defendant by the purported wrongdoers. Plaintiff also contends that the lower court misapplied Sack v. Low and that, notwithstanding

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* In addition to the authorities relied upon by Judge Carter, see Monolith Portland Midwest Co. v. Kaiser Aluminum & Chem. Corp., 407 F.2d 288, 292-93 (9th Cir. 1969); De Tarr v. Texaco, Inc., 267 Cal. App. 2d 872, 73 Cal. Rptr. 511 (1968); Bell v. Bayly Bros. Inc., 53 Cal. App. 2d 149, 159, 127 P.2d 662, 667 (1942); cf. Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972).

the three alternative bases on which Judge Carter held that the cause of action accrued in California for borrowing statute purposes, the New York courts would conclude that such cause of action accrued in New York.

Finally, relying on the factually incorrect contention that there was no discovery on the merits, and notwithstanding plaintiff's failure to request further discovery or to submit any opposing affidavits raising factual issues, plaintiff seeks to overturn the ruling below on the basis of the court's alleged "impermissible" decision of fact questions, and its alleged failure to afford plaintiff an adequate opportunity to resort to discovery procedures.

I.

PLAINTIFF'S FAILURE BELOW TO RAISE, OR PRESENT EVIDENCE ON, A FACTUAL CONTENTION OF "ADVERSE DOMINATION" PRECLUDES HIS PRESENT EFFORT TO OVERTURN ON THIS BASIS THE SUMMARY JUDGMENT GRANTED BY THE DISTRICT COURT

In this Court plaintiff contends for the first time that the action is not time-barred because of defendants' alleged adverse domination of Fund. Not only was this issue "not expressly argued" in the District Court, as plaintiff concedes (App. Br. p. 16), but it was in no way alluded to, or even obliquely suggested, as a basis for denying defendants' motion for summary judgment. (See 133a-146a)

It is well settled that "the general rule of practice . . . forecloses appellate consideration of issues not raised below." Terkildsen v. Waters, 481 F.2d 201, 204 (2d Cir. 1973); see also, e.g., Mills v. Long Island R.R. Co., 515 F.2d 181, 184 (2d Cir. 1975). No basis for deviation from the general rule is applicable to the present case.

In the first place, plaintiff's eleventh hour contention raises factual rather than legal questions. The "domination" on which plaintiff's argument hinges is not presumed as a matter of law. In the case on which plaintiff places his chief reliance, Judge Friendly expressly held:

> ". . . a plaintiff who seeks to toll the statute on the basis of domination of a corporation has the burden of showing 'a full, complete and exclusive control in the directors or officers charged' . . . . This principle must mean at least that once the facts giving rise to possible liability are known, the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue." International Rys. of Cent. Amer. v. United Fruit Co., 373 F.2d 408, 414 (2d Cir.), cert. denied, 387 U.S. 921 (1967).

This Court, and other courts of appeals, have consistently refused to permit an appellant to raise factual questions not previously presented to the lower court. As Judge Feinberg noted in Terkildsen v. Waters, supra:

> "Adherence to the rule [foreclosing appellate consideration] is particularly apt where, as here, factual questions may have been implicated as to which the judge made no findings because the issue was not directly raised and equally, where considerations underlying a subtle legal issue could have been exposed and distilled by the able district judge so as to facilitate more informed consideration by this court." (481 F.2d at 204-05) (Emphasis added)

Similarly, in Green v. Brown, 398 F.2d 1006 (2d Cir. 1968), relied on heavily by plaintiff, this Court stated that "we would not ordinarily be receptive to attempts to litigate issues not raised in the trial court" and, while permitting an exception in view of the important question of law presented by appellant, observed that "[t]he basic facts are not contested." (Id. at 1009, 1007) See also List v. Fashion Park, Inc., 340 F.2d 457, 461 (2d Cir.), cert. denied, 382 U.S. 811 (1965) ("[W]e decline to consider a claim not presented to the trial court which raises substantial issues of fact, requiring resolution. . . .")

The rule barring reversal on the basis of factual issues raised de novo at the appellate level is particularly applicable when a summary judgment has been granted. Under General Rule 9(g) of the District Court, plaintiff was required in his papers opposing defendants' summary judgment motion to "include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." No issue of "domination" was identified in "Plaintiff's Opposing Statement under Rule 9(g)" as presenting a triable issue.

(See 131a-132a) It would be patently unsound to reverse a summary judgment on the basis of an alleged factual contention never made below. There would be no finality to summary judgments were any such doctrine applied. The reasoning of the Fifth Circuit in DeBardeleben v. Cummings, 453 F.2d 320, 324-25 (5th Cir. 1972) is squarely applicable to the present case:

> " . . . any genuine material issue of fact must somehow be shown to exist in the District Court. Where the moving papers do not reveal the presence of a factual controversy on a material issue, the adversary cannot simply assent by silence to the factual theory presented in the motion - and on which the parties stand in the Trial Court - and then assert thereafter on appeal as grounds for reversal a purported factual disagreement never before revealed . . . .
>
> "Judged by these standards the propriety of summary judgment here is undeniable. On appeal the [appellants] . . . argue what is in effect an entirely new theory of the case, never presented to the District Court, based upon [an] . . . ostensibly unresolved factual issue . . . . The Trial Court is not to be trapped by methods which focus on the critical decision, only to be brought up short in the appellate court by the related argument that some condition implicit in the underlying controversy had not adequately been eliminated as a factual dispute. . . . We cannot now recognize this D-minus one attempt to resurrect and breathe new juridical life into a moribund issue strangled in its crib by appellants' inaction." (Emphasis added)

See also Garcia v. American Marine Corp., 432 F.2d 6, 8 (5th Cir. 1970).

Other decisions of this Court are in complete accord. Thus, in River Plate and Brazil Conferences v. Pressed Steel Car Co., 227 F.2d 60, 63 (2d Cir. 1955), Judge Lumbard said:

> "We cannot reverse the summary judgment on the basis of arguments and facts not presented to the District Court."

Similarly, in Edward B. Marks Music Corp. v. Continental Record Co., 222 F.2d 488, 492 (2d Cir.), cert. denied, 350 U.S. 861 (1955), Judge Hincks rejected the very tactic which plaintiff here seeks to employ, stating:

> ". . . a plaintiff in his opposition to a motion for summary judgment cannot abandon an issue and then, after an unpalatable decision by the trial judge, on appeal, by drawing on the pleadings resurrect the abandoned issue."

In view of the holding of International Rys., supra, plaintiff's silence below on the "domination" point represented a failure to raise a factual issue on which the burden of proof was squarely his.

Moreover, even assuming that plaintiff's contention were deemed to raise a pure question of law, there would not here be present the exceptional circumstances of overriding public importance which would justify a departure from the general rule barring consideration of

issues not raised below.* Whether these particular defendants did or did not "dominate" Fund in such a manner as to effect a tolling is a question uniquely related to this case, and hardly presents a significant, generally applicable issue which cries out for appellate attention notwithstanding an appellant's prior silence. Indeed, whether this particular case does or does not fall within the reach of Rosenfeld v. Black is not a question of compelling public concern. Only one of Fund's 25,000 shareholders has even seen fit to make the contention. Moreover, Congress has decided, in the words of Judge Carter, "to blunt the force of" Rosenfeld (106a) by enacting on June 4, 1975 Section 15(f) of the Investment Company Act, 15 U.S.C. § 80a-15(f) (Securities Acts Amendments of 1975, § 28(1), 89 Stat. 164-65). Thus a specific legislative standard will govern future litigation raising questions like those tendered by the complaint herein.

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* This general rule was expressly recognized in cases on which plaintiff relies. (See App. Br. pp. 17-18)

II.

IN ANY EVENT THE "ADVERSE DOMINATION" DOCTRINE IS NOT APPLICABLE HERE

Even if the "domination" issue had been timely raised in the lower court, it would not have provided a sound basis for tolling the statute.

As Judge Carter expressly held and as plaintiff does not deny, "the events which give rise to plaintiff's cause of action have been public knowledge since 1968 as a result of the proxy statements of Fund, AMEXCO and FAC describing the acquisition complained of. . . ." (170a). No "domination" or "concealment" by defendants in any way precluded plaintiff or any other stockholder of Fund from discovering the relevant facts and commencing a derivative suit. Whether the statute should be deemed tolled under these circumstances was characterized by Judge Friendly in International Rys., supra, as a "vexing problem," which the Court saw fit to "leave for another day" in view of its conclusion that plaintiff had not, in any event, met its stringent burden of proof as to domination. (373 F.2d at 412, 415-16).

In Saylor v. Lindsley, 302 F. Supp. 1174 (S.D.N.Y. 1969), also relied on by plaintiff, the court held that a factual question was presented as to the application of the

"adverse domination" doctrine to a derivative action. This was not a case where public knowledge of the events complained of was conceded. Indeed, the court noted that "'there is . . . the suggestion in the record that annual reports distributed by the corporation within six years of the instant action may have been designed by the defendants to mislead stockholders as to the true facts. . . .'" (Id. at 1183-84; see also id. at 1184-85 n.21).

Thus, no decision has yet held that, notwithstanding full disclosure, a stockholder who waits to commence a derivative action until after the running of the statutory period may claim a tolling because of defendants' adverse domination of the nominal defendant. Adoption of any such doctrine would obviously have far-reaching implications. In any case where the defendants remained in control of the allegedly injured corporation from the time of the events complained of, the statute would arguably be indefinitely tolled for every stockholder suing derivatively, even if the relevant facts had at all times been fully known to the outside world. Surely courts should move with extreme caution before creating this big a hole in the protective wall of the statute of limitations. See International Rys., supra, 373 F.2d at 415-16 n.11. In any event, the present case is hardly the appropriate one to resolve the question left "for another day", in view of plaintiff's

unexplained failure to raise the issue below or to come forward with any factual showing, and the resulting absence of the District Court's views.

Even if proof of adverse domination could effectuate a tolling in the context of a derivative suit, notwithstanding full disclosure, the facts here presented are such that the doctrine could not be successfully availed of by this plaintiff. The tolling would only be applicable to claims against the wrongdoers who are alleged to have dominated the nominal defendant. The allegations in the complaint on which plaintiff now belatedly relies, made solely for purposes of Fed. R. Civ. P. 23.1, relate only to alleged domination of Fund by its Board of Directors as of the time this action was commenced. (App. Br. p. 13; 13a-14a)* There are no allegations in the complaint, or anywhere else in the record, as to domination of Fund by other defendants herein, such as Amexco, AEIMCO and FAC.

Moreover, the composition of the Board of Directors of Fund does not support an accusation of "full, complete and exclusive control in the directors or officers

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* As International Rys. makes clear, a set of facts relied on to establish futility of demand for purposes of Rule 23.1 does not necessarily establish the "domination" resulting in a tolling.

charged", and militates against plaintiff's necessary showing that an informed stockholder or director could not have induced the cooperation to sue. International Rys., supra, 373 F.2d at 414. Of the nine individual defendants, who comprised Fund's Board of Directors at the time of the transactions complained of, six were no longer directors of Fund when this action was brought. (Ans. & Obj. of Defs. to Pl.'s Inter. (First Series), p. 3)* Moreover, none of the defendant directors is accused of personally profiting from the sale of FAIMCO to Amexco's subsidiary. Five of the defendant directors (comprising a majority of the Board in 1968), including Professor George E. Osborne of the University of California Hastings College of Law and Professor Herbert E. Dougall of the Graduate School of Business of Stanford University, had no ties whatever with Amexco, FAC, FAIMCO or AEIMCO at the time of the transactions complained of or at any time thereafter. (Ans. & Obj. of Defs. to Pl.'s Inter. (First Series), pp. 3, 6-8, 9-11, 13-16; Aff. of George E. Osborne sworn to June 13, 1974; Aff. of Herbert E. Dougall sworn to June 14, 1974)

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* Plaintiff argues that "[a]dverse domination of the Board of Fund is amply demonstrated in the vigorous manner in which Fund has attempted to defeat this action...." (App. Br. p. 13) This contention is without merit. Fund did not join in the motion for summary judgment made below. (See 107a-108a) Its participation in the transfer motion was based on considerations as to its own inconvenience and expense. (87a-90a)

In view of the foregoing, "the possibility can by no means be dismissed as negligible" that directors would not "have been obdurate" in response to a well-founded demand that Fund bring suit. International Rys., supra, 373 F.2d at 414. "[T]he legal implications of arbitrary refusal ... would hardly have escaped the minds of the directors, and certainly not of counsel to whom they would surely have referred a stockholder's or director's request." (Id. at 415)

III.

THE DISTRICT COURT CORRECTLY HELD, ON THE BASIS OF UNDISPUTED FACTS, THAT THE CAUSE OF ACTION ACCRUED IN CALIFORNIA UNDER NEW YORK LAW, AS INTERPRETED IN SACK v. LOW

In Sack v. Low, 478 F.2d 360 (2d Cir. 1973), this Court considered at length where a cause of action in tort shall be deemed to accrue for purposes of the New York borrowing statute. After reviewing the relevant authorities, Judge Friendly concluded that the place of accrual is "the state where the injury is suffered rather than where the defendant committed the wrongful acts." (Id. at 366) He further observed that it is "normally the plaintiff's residence" where the "economic impact is felt" from a commercial wrong. (Ibid.)

Plaintiff is in error in insinuating that the Sack v. Low analysis is limited to a charge of fraud. (App. Br. pp. 9, 20). Judge Friendly specifically held that a claim in Sack based on the federal securities laws "arose where the loss was suffered rather than where the wrongful conduct occurred, even though fraud is not an ingredient...." (478 F.2d at 366 n.2)

In the instant case it is undisputed that Fund, whose rights are asserted in this derivative action, was at all relevant times a Delaware corporation with its prinipal place of business in California, and that it has never qualified to transact business in New York. (112a, 130a, 165a) The economic impact of the alleged injury to Fund in connection with the sale of the stock of FAIMCO would have been felt in California. Thus, the cause of action accrued there under Sack v. Low, as Judge Carter correctly held.

It is necessary to go no further. While plaintiff alleges that the District Court lacked "an adequate factual record" to determine the place of accrual, the undisputed facts mentioned above provide a sufficient basis for applying the Sack v. Low test, i.e., the place where the victim experienced the injury. Moreover, plaintiff did not assert below, in opposition to the summary judgment motion,

any specific factual disputes which precluded determination of place of accrual, nor did he seek an opportunity, under Fed. R. Civ. P. 56(f), to obtain further discovery. Plaintiff relied on the admitted facts that Amexco's activities in connection with the transactions complained of occurred in New York, that most of the meetings during the negotiation period were held in this state, and that professionals who worked on the matter were located here. (131a-132a, 136a-141a)* As these facts relate, at best, to the place where the wrongful acts occurred rather than where the injury was suffered, they have no bearing on the place of accrual under Sack.

As noted in Point I supra, plaintiff cannot now seek a reversal of the summary judgment on the basis of alleged unresolved factual issues which were not raised below. Nor can a plaintiff confronted with a summary judgment motion refrain from submitting opposing affidavits, or from seeking leave to take discovery, and then argue that the motion was erroneously granted because of unresolved factual contentions, or because of allegations made only in the complaint. Fed. R. Civ. P. 56(e) and (f). See, e.g., First

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* The court below noted that those New York contacts were insufficient to negate the overwhelming evidence that the activities complained of were carried out primarily in California. (165a) See Point IV infra.

Nat'l Bank v. Cities Service Co., 391 U.S. 253, 288-89 (1968); Tunnell v. Wiley, 514 F.2d 971, 976 (3d Cir. 1975); Beal v. Lindsay, 468 F.2d 287, 291 (2d Cir. 1972); Donnelly v. Guion, 467 F.2d 290, 293 & n.7 (2d Cir. 1972); Garcia v. American Marine Corp., 432 F.2d 6, 7-8 (5th Cir. 1970); Schneider v. McKesson & Robbins, Inc., 254 F.2d 827, 831 (2d Cir. 1958).

Thus, as the foregoing authorities make perfectly clear, plaintiff's present contentions as to inadequate development of the facts below and lack of opportunity to engage in discovery provide no basis whatever for reversing the lower court. "A summary judgment motion is intended to 'smoke out' the facts so that the judge can decide if anything remains to be tried." Donnelly v. Guion, supra, 467 F.2d at 293. It was plaintiff's obligation below to make a factual record, or at least to request a chance to do so, if he intended to resist the summary judgment motion on the ground of the existence of "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Equally lacking in merit is plaintiff's contention that, notwithstanding the analysis by this Court in Sack v. Low, the New York courts would hold that, for borrowing statute purposes, the cause of action accrued in this state. In support of this assertion, plaintiff relies on Ripley v. International Rys. of Central America,

8 N.Y.2d 430, 209 N.Y.S.2d 289 (1960).* Yet a reading of this decision reveals no reference whatever to the borrowing statute (then § 13 of the Civil Practice Act), and no consideration of any contention that the action was barred by foreign law pursuant to such statute. We are thus at a loss to understand plaintiff's claim that in Ripley "the New York Court of Appeals refused to apply its borrowing statute so as to bar a derivative action...." (App. Br. p. 3; see also p. 26)

While not mentioned by plaintiff, it is true that the Appellate Division in Ripley did conclude that the Guatemala statute of limitations was inapplicable because "the cause of action did not arise in Guatemala...." Ripley v. International Rys. of Central America, 8 App. Div. 2d 310, 323, 188 N.Y.S.2d 62, 77 (1st Dep't 1959). The reason for so holding was that "the main offices of both companies [i.e., the New Jersey corporation on whose behalf the derivative suit was brought and the real defendant] were in the United States, their Boards of Directors met in this country, and most of the acts in which domination and control were asserted occurred here...." (Ibid.)

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* The Ripley case was not cited by plaintiff below. (See 133a-146a)

Since the main office of the nominal defendant was not in Guatemala, a conclusion that the cause of action did not accrue in that country is in all respects consistent with Sack v. Low , which focuses on a plaintiff's place of residence. It should also be noted that Ripley was decided thirteen years before Sack v. Low, and was thus a precedent available to this Court in reaching the conclusions as to New York law expressed in the Sack decision. Judge Friendly's familiarity with Ripley is shown by his extensive discussion of the case in International Rys., supra. (See 373 F.2d at 411, 415, 417)

Plaintiff's dependence on Jones v. Greyhound Bus Lines, 73 Misc. 2d 109, 341 N.Y.S.2d 159 (Sup. Ct. Orange Co. 1973) is also misplaced. There the court refused to apply the borrowing statute to a plaintiff who was in the process of changing his residency to New York State at the time that the tortious acts occurred. There is no remotely comparable event presented by the instant case.

Nor is plaintiff aided by its reliance on decisions such as Babcock v. Jackson , 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963). In Sack v. Low, Judge Friendly specifically observed that "the sophisticated teachings" applied to choice of law problems by New York courts in cases like Babcock were in sharp contrast to the "rather simplistic approach" taken in interpreting

the borrowing statute. (373 F.2d at 366-67) The Court expressly held that Babcock and its progeny were irrelevant in determining place of accrual for purposes of CPLR § 202. (Ibid.)

IV.

THE CAUSE OF ACTION ACCRUED IN CALIFORNIA UNDER ALL OTHER TESTS WHICH MIGHT BE APPLICABLE

The affidavit submitted by defendants in support of their summary judgment motion established the following:

(a) The agreement between Amexco and FAC, pursuant to which the shares of FAIMCO were transferred to a newly formed wholly-owned subsidiary of Amexco, was entered into in California.

(b) The meeting of the Board of Directors of Fund, at which a new underwriting agreement between Fund and FAIMCO was approved, and at which the Board determined to recommend to the stockholders of Fund that a new investment advisory agreement between Fund and FAIMCO be approved, took place in California.

(c) The challenged proxy material of Fund for the special meeting of stockholders held September 24, 1968 was prepared in California and was mailed from California.

(d) The special meeting itself was held in California.

(e) The new investment advisory agreement between Fund and FAIMCO and the new underwriting agreement between Fund and FAIMCO were executed in California.

(f) The closing between Amexco and FAC, pursuant to which the assets of FAC, including the shares of FAIMCO, were transferred by FAC to a newly formed subsidiary of Amexco took place in California. (112a-113a, 164a-165a)

On the basis of the foregoing facts, which were in no way controverted by plaintiff, Judge Carter held that the cause of action would be deemed to have accrued in California even if the test to be applied were that rejected in Sack v. Low, i.e., place of committal of the allegedly wrongful acts. While, as plaintiff asserted in opposing the summary judgment motion, negotiations as to the acquisition of FAC by Amexco occurred in New York, and attorneys, accountants and other personnel retained or employed by Amexco on the FAC transaction were located in New York, Judge Carter held such activities to be "insufficient to negate the overwhelming evidence that the activities complained of were carried out primarily in California." (165a) This conclusion is unassailable, and we do not understand

on what basis a reversal can be justified even assuming that a "place of wrongdoing" test were controlling.

Finally, as Judge Carter observed (165a-166a), this Court has indicated that even "if it could fairly be said that the cause of action arose in both New York and" California, it would still be deemed to have accrued "without the state" for purposes of the borrowing statute. Sack v. Low, supra, 478 F.2d at 368; see also Oglesby v. Cranwell, 250 App. Div. 720, 293 N.Y.S. 67, 68 (2d Dep't 1937). In Sack Judge Friendly commented:

> "There is much to be said for thus recognizing that a cause of action can arise in more than one place and, under an appropriate borrowing statute, is barred if the statute of limitations has run in one where the defendant was available for suit, at least when the one is the state of plaintiff's residence." (478 F.2d at 368)

It is undisputed that California was and is the state of residence of the allegedly injured corporation (i.e. the party in whose favor the cause of action accrued under CPLR § 202), and that all defendants were available for suit in California. (166a-167a) In view of the undenied presence--indeed, predominance--of significant California contacts, the claims asserted herein cannot possibly be deemed to have arisen exclusively in New York. Accordingly, Sack v. Low compels the conclusion that the California limitations period is fully applicable.

V.

NO CONGRESSIONAL POLICY MILITATES AGAINST APPLICATION OF THE CALIFORNIA LIMITATIONS PERIOD

In applying the federal securities laws, the courts have repeatedly held that, when Congress has failed to provide a controlling statute of limitations, state law, including any state borrowing statute, will govern. E.g., Sack v. Low, supra, 478 F.2d at 365. The purpose of a borrowing statute is to add to the bar afforded by local law a further potential hurdle to maintenance of the action, namely, the bar of the foreign state whose law is to be incorporated.

As the relevance of borrowing statutes to federal securities claims like those here asserted is beyond dispute, it is absurd for plaintiff to contend that federal policy compels rejection of a shorter statute of limitations made applicable by such a statute. Moreover, it is not necessary to decide whether plaintiff's decision to sue in a Second Circuit, rather than a Ninth Circuit, district court represents "shopping" for a forum with a supposedly more favorable law, in contravention of applicable policy. Since the conditions of CPLR § 202 for incorporation of the California limitations period have been complied with, the action may not proceed.* Judge Carter expressly so held, and plaintiff has advanced no sound basis whatever for reaching a different result.

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* While plaintiff emphasizes that all but one defendant resides outside New York (App. Br. p. 28), the benefits of CPLR § 202 are not limited by statute to those who are New York residents.

CONCLUSION

The opinion and order appealed from should be affirmed.

Dated: New York, New York
May 3, 1976

Respectfully submitted,

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